THE RHODE ISLAND QUESTION.

MR. WEBSTER'S ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES,

IN THE CASE OF

MARTIN LUTHER

VS.

LUTHER M. BORDEN AND OTHERS,

JANUARY 27TH, 1848.

WASHINGTON:

PRINTED BY J. AND G. S. GIDEON.

1848.

THE RHODE ISLAND QUESTION.

MR. WEBSTER'S ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES,

IN THE CASE OF

MARTIN LUTHER

VS.

LUTHER M. BORDEN AND OTHERS,

JANUARY 27TH, 1848.

WASHINGTON:
PRINTED BY J. AND G. S. GIDEON.
1848.

ARGUMENT.

Mr. Webster said there was something novel and extraordinary in the case now before the Court. It is not such a one as is usually presented, all will admit, for judicial consideration.

It is well known that in the years 1841 and 1842, political agitation existed in Rhode Island. Some of the citizens of that State undertook to form a new constitution of government, beginning their proceedings towards that end by meetings of the people, held without authority of law, and conducting those proceedings through such forms as led them, in 1842, to say that they had established a new constitution and form of government, and placed Mr. Thos. W. Dorr, at its head. The previously existing, and then existing, government of Rhode Island treated these proceedings as nugatory, so far as they went to establish a new constitution; and criminal, so far as they proposed to confer authority upon any persons to interfere with the acts of the existing government, or to exercise powers of legislation, or administration of the laws.

All will remember that the state of things approached, if not actual conflict between men in arms, at least the "perilous edge of battle." Arms were resorted to, force was used, and greater force threatened.

In June, 1842, this agitation subsided. The new government, as it called itself, disappeared from the scene of action. The former government, the Charter Government, as it was sometimes styled, resumed undisputed control, went on in its ordinary course, and the peace of the State was restored.

But the past had been too serious to be forgotten. The Legislature of the State had, at an early stage of the troubles, found it necessary to pass special laws for the punishment of the persons concerned in these proceedings. It defined the crime of treason, as well as smaller offences, and authorized the declaration of martial law. Governor King, under this authority, proclaimed the existence of treason and rebellion in the State, and declared the State under martial law.

This having been done, and the ephemeral government of Mr. Dorr having disappeared, the grand juries of the State found indictments against several persons for having disturbed the peace of the State, and one against Dorr himself, for treason. This indictment came on in the supreme court of Rhode Island in 1844, before a tribunal admitted on all hands to be the legal judicature of the State. He was tried by a jury of Rhode Island, above all objection, and after all challenge. By that jury, under the instructions of the court, he was convicted of treason, and sentenced to imprisonment for life.

Now, an action is brought in the courts of the United States, and before your Honors, by appeal, in which it is attempted to prove that the characters of this drama have been oddly and wrongly cast; that there has been a great mistake in the courts of Rhode Island. They say, that Mr. Dorr, instead of being a traitor or an insurrectionist, was the real Governor of the State at the time; that the force used by him was exercised in defence of the constitution and laws, and not against them; that he who opposed the constituted authorities was not Mr. Dorr, but

Gov. King; and that it was *he* who should have been indicted, and tried, and sentenced. This is rather an important mistake, to be sure, if it be a mistake. "Change places," cries poor Lear, "*change places*, and, *handy-dandy*, which is the Justice and which the thief?" So our learned opponents say, "change places, and, *handy-dandy*, which is the Governor and which the rebel!"

The aspect of the case, therefore, is, as I have said, novel. It may perhaps give vivacity and variety to judicial investigations. It may relieve the drudgery of perusing briefs, demurrers, and pleas in bar, bills in equity and answers; and introduce topics which give sprightliness, freshness, and something of an uncommon public interest, to proceedings in courts of law.

However impossible it may be, and I suppose it to be *wholly* impossible, that this court should take judicial cognizance of the questions which the plaintiff has presented to the court below, yet I do not think it a matter of regret that the cause has come hither. It is said, and truly said, that the case involves the consideration and discussion of what are the true principles of government in our American system of public liberty. This is very right. The case does involve these questions, and harm can never come from their discussion, especially when such discussion is addressed to reason and not to passion; when it is had before magistrates and lawyers, and not before excited masses out of doors. I agree entirely that the case does raise considerations, somewhat extensive, of the true character of our American system of popular liberty; and although I am constrained to differ from the learned counsel who opened the cause for the plaintiff in error, on the principles and character of that American liberty, upon the true characteristics of that American system on which changes of the Government and Constitution, if they become necessary, are to be made, yet I agree with him that this case does present them for consideration.

Now, there are certain principles of public liberty, which, though they do not exist in all forms of government, exist, nevertheless, to some extent in different forms of government. The protection of life and property, the *habeas corpus*, trial by jury, the right of open trial, these are principles of public liberty existing in their best form in the republican institutions of this country, but, to the extent mentioned, existing also in the Constitution of England. Our American liberty, allow me to say, therefore, has an ancestry, a pedigree, a history. Our ancestors brought to this continent all that was valuable, in their judgment, in the political institutions of England, and left behind them all that was without value, or that was objectionable. During the colonial period they were closely connected of course with the colonial system; but they were Englishmen, as well as colonists, and took an interest in whatever concerned the mother country, especially in all great questions of public liberty in that country. Therefore they took a deep concern in the revolution of 1688. The American colonists had suffered from the tyranny of James the Second. Their charters had been wrested from them by mockeries of law and by the corruption of judges in the city of London; and in no part of England was there more gratification or a more resolute feeling, when James abdicated and William came over, than

in the American colonies. All know that Massachusetts immediately overthrew what had been done under the reign of James, and took possession of the colonial fort in the name of the new King.

When the United States separated from England, by the Declaration of 1776, they departed from the political maxims and examples of the mother country, and entered upon a course more exclusively American. From that day down, our institutions and our history relate to ourselves. Through the period of the Declaration of Independence, of the Confederation, of the Convention, and the adoption of the Constitution, all our public acts are records, out of which a knowledge of our system of American liberty is to be drawn.

From the Declaration of Independence, the governments of what had been colonies before, were adapted to their new condition. They no longer owed allegiance to crowned heads. No tie bound them to England. The whole system became entirely popular, and all legislative and constitutional provisions had regard to this new, peculiar, American character, which they had assumed. Where the form of government was already well enough, they let it alone. Where necessary, they reformed it. What was valuable, they retained; what was essential, they added, and no more. Through the whole proceeding, from 1776, to the latest period, the whole course of American public acts, the whole progress of this American system, was marked by a peculiar conservatism. The object was to do what was necessary, and no more; and to do that, with the utmost temperance and prudence.

Now, without going into historical details at length, let me state what I understand the American principles to be, on which this system rests.

First and chief, no man makes a question, that the People are the source of all political power. Government is instituted for their good, and its members are their agents and servants. He who would argue against this, must argue without an adversary. And who thinks there is any peculiar merit in asserting a doctrine like this, in the midst of twenty millions of people, when nineteen millions, nine hundred and ninety-nine thousand, nine hundred and ninety-nine of them, hold it, as well as himself? There is no other doctrine of government here; and no man imputes to another, and no man should claim for himself, any peculiar merit for asserting what every body knows to be true, and nobody denies. Why, where else can we look but to the People, for political power, in a popular government? We have no hereditary Executive, no hereditary branch of the legislature, no inherited masses of property, no system of entails, no long trusts, no long family settlements, no primogeniture. Every estate in the country, from the richest to the poorest, is divided among sons and daughters alike. Alienation is made as easy as possible; everywhere the transmissibility of property is perfectly free; the whole system is arranged so as to produce, as far as unequal industry and enterprise render it possible, a universal equality among men; an equality of rights absolutely, and an equality of condition, so far as the different characters of individuals will allow such equality to be produced. He who considers that there may be, is, or ever has been, since the Declaration of Independence, any body who looks to any other source of power in this country but the People, so as

to give those peculiar merit who clamor loudest in its assertion, must be out of his mind, even more than Don Quixote. His imagination was only perverted. He saw things not as they were, though what he saw were things. He saw windmills, and took them to be armed men —knights on horseback. This was bad enough; but whoever says, or speaks as if he thought, that any body looks to any other source of political power in this country but the people, must have a stronger and a wilder imagination, for he sees nothing but the creations of his own fancy. He stares at phantoms. Well, then, let all admit, what none deny, that the only source of political power in this country is the people. Let us admit that they are *sovereign*, for they are so; that is to say, the aggregate community, the collected will of the people, is sovereign. I confess that I think Chief Justice Jay spoke rather paradoxically than philosophically, when he said that this country exhibited the extraordinary spectacle of many sovereigns and no subjects. The people, he said, are all sovereigns: and the peculiarity of the case is, that they have no subjects, except a few colored persons. This must be rather fanciful. The aggregate community is sovereign, but that is not *the* sovereignty which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish a government, and invest it with so much of the sovereign power as the case requires: and this sovereign power being delegated and placed in the hands of the government, that government becomes what is popularly called THE STATE. I like the old fashioned way of stating things as they are; and this is the true idea of a State. It is an organized government, representing the collected will of the people, so far as they see fit to invest that government with power. And, in that respect, it is true that though *this* Government possesses sovereign power, it does not possess *all* sovereign power: and so the State governments, though sovereign in some respects, are not so in all. Nor could it be shown that the powers of both, as delegated, embrace the whole range of what might be called sovereign power. We usually speak of States as sovereign States. I do not object to this. But the Constitution never so styles them, nor does the Constitution speak of the Government here, as the *general* or the *federal* Government. It calls this Government the United States; and it calls the State governments, State governments. Still the fact is undeniably so: legislation is a sovereign power, and is exercised by the United States Government to a certain extent, and also by the States, according to the forms which they themselves have established, and subject to the provisions of the Constitution of the United States.

Well, then, having agreed that all power is originally from the people, and that they can confer as much of it as they please, the next principle is, that, as the exercise of legislative power and the other powers of government immediately by the People themselves is impracticable, they must be exercised by REPRESENTATIVES of the People: and what distinguishes American Governments as much as anything else from any governments of ancient or of modern times, is the marvellous felicity of their representative system. It has with us, allow me to say, a somewhat different origin from the representation of the Commons in England, though that has been worked up to some resemblance of our own. The representative system

in England originated, not in any supposed rights of the people themselves, but in the necessities and commands of the crown. At first, knights and burgesses were summoned, often against their will, to a parliament called by the King. Many remonstrances were presented against sending up these representatives: the charge of paying them was, not unfrequently, felt to be burdensome by the people. But the King wished their counsel and advice, and perhaps the presence of a popular body, to enable him to make greater headway against the feudal barons in the aristocratic and hereditary branch of the legislature. In process of time these knights and burgesses assumed more and more a popular character, and became, by degrees, the guardians of popular rights. The people through them obtained protection against the encroachments of the crown and the aristocracy, till in our day they are understood to be the Representatives of the People, charged with the protection of their rights. With us it was always just so. Representation has always been this. The power is with the people; but they cannot exercise it in masses or *per capita*; they can only exercise it by their representatives. The whole system with us has been popular from the beginning.

Now, the basis of this representation is suffrage. The right to choose representatives is every man's part in the exercise of sovereign power:—to have a voice in it, if he has the proper qualifications, that is the fundamental exercise of political power by every elector. That is the beginning. That is the mode in which power emanates from its source and gets into the hands of conventions, legislatures, courts of law, and the chair of the executive. It begins in suffrage. Suffrage is the delegation of the power of an individual to some agent.

This being so, then follow two other great principles of the American System:

1. The first is, that the Right of Suffrage shall be guarded, protected, secured against force and against fraud; and,

2. The second is, that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise—under whose supervision—always sworn officers of the law,—is to be prescribed. And then again the results are to be certified to the central power by some certain rule, by some known public officers, in some clear and definite form, to the end that two things may be done—*first*, that every man, entitled to vote, may vote; *second*, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty, in common with his fellow men.

In the exercise of political power through representatives we know nothing, we never have known any thing, but such an exercise as should be carried through the prescribed forms of law; and when we depart from that, we shall wander as widely from the American track as the pole is from the track of the sun.

I have said that it is one principle of the American System, that the people limit their governments, National and State. They do so; but it is another principle, equally true and certain, and according to my judgment of things equally important, that the people often *limit themselves*. They set bounds to their own power. They have chosen to

secure the institutions which they establish against the sudden impulses of mere majorities. All our institutions teem with instances of this. It was their great conservative principle, in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. By the fifth article of the Constitution of the United States, Congress, two-thirds of both Houses concurring, may propose amendments to the Constitution; or, on the application of the legislatures of two-thirds of the States, may call a convention; and amendments proposed in either of these forms must be ratified by the legislatures or conventions of three-fourths of the States. That fifth article of the Constitution, if it was made a topic for those who framed the "people's constitution" of Rhode Island, could only have been a topic of reproach. It gives no countenance to any of their proceedings or to any thing like them. On the contrary, it is one remarkable instance of the enactment and application of that great American principle, that the constitution of government should be cautiously and prudently interfered with, and that changes should not ordinarily be begun and carried through by bare majorities.

But the people limit themselves also in other ways. They limit themselves in the first exercise of their political rights. They limit themselves, by all their constitutions, in two important respects,—that is to say, in regard to the qualifications of *electors*, and in regard to the qualifications of the *elected*. In every State, and in all the States, the people have precluded themselves from voting for anybody they may choose; they have limited their own right of choosing. They have said, we will elect no man who has not such and such qualifications. We will not vote ourselves, unless we have such and such qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections. They must vote at a particular place, at a particular time, and under particular conditions, or not at all. It is in these modes that we are to ascertain the will of the American people; and our Constitution and laws know no other mode. We are not to take the will of the people from public meetings, nor from tumultuous assemblies, by which the timid are terrified, the prudent are alarmed, and by which society is disturbed. These are not American modes of signifying the will of the people, and they never were. If any thing in the country, not ascertained by a regular vote, by regular returns, and by regular representation, has been established, it is an exception and not the rule; it is an anomaly which, I believe, can scarcely be found. It is true that at the Revolution, when all government was immediately dissolved, the people got together, and what did they do? Did they exercise sovereign power? They began an inceptive organization, the object of which was to bring together representatives of the people, who should form a government. This was the mode of proceeding in those States where their legislatures were dissolved. It was much like that had in England upon the abdication of James the Second. He ran away—he abdicated. He threw the great seal into the Thames. I am not aware that on the 4th of May, 1842, any great seal was thrown into Providence river! But James abdicated, and King William took the government; and how did he proceed? Why, he at once requested all who had been members of

the old Parliament, of any regular Parliament in the time of Charles the Second, to assemble. The Peers, being a standing body, could of course assemble; and all they did was to recommend the calling of a convention, to be chosen by the same electors, and composed of the same numbers, as composed a parliament. And the convention assembled, and, as all know, was turned into a parliament. This was a case of necessity—a revolution. Don't we call it so? And why? Not merely because a new sovereign then ascended the throne of the Stuarts, but because there was a change in the organization of the government. The legal and established succession was broken. The convention did not assemble under any preceding law. There was a *hiatus*, a syncope, in the action of the body politic. This was revolution, and the parliaments that assembled afterwards referred their legal origin to that revolution.

Is it not obvious enough, that men cannot get together and count themselves, and say they are so many hundreds and so many thousands, and judge of their own qualifications, and call themselves the people, and set up a government? Why, another set of men, forty miles off, on the same day, with the same propriety, with as good qualifications, and in as large numbers, may meet and set up another government; one may meet at Newport and another at Chepachet, and both may call themselves the people. What is this but anarchy? What liberty is there here but a tumultuary, tempestuous, violent, stormy liberty—a sort of South American liberty, without power except in its spasms—a liberty supported by arms to-day, crushed by arms to-morrow. Is that *our* liberty?

The regular action of popular power, on the other hand, places upon public liberty the most beautiful face that ever adorned that angel form. All is regular and harmonious in its features, and gentle in its operation. The stream of public authority, under American liberty, running in this channel, has the strength of the Missouri, while its waters are as transparent as those of a crystal lake. It is powerful for good. It produces no tumult, no violence, and no wrong;

> "Though deep, yet clear, though gentle, yet not dull;
> "Strong without rage, without o'erflowing, full."

Another American principle growing out of this, and just as important and well settled as is the great truth that the people are the source of power, is, that when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history? It would take me from now till the sun shall go down, to advert to all the instances of it, and I shall only refer to the most prominent, and especially to the establishment of the Constitution, under which you sit. The old Congress, upon the suggestion of the delegates who assembled at Annapolis, in May, 1786, recommended to the States that they should send delegates to a convention to be holden at Philadelphia, to form a Constitution. No article of the old Confederation gave them power to do this; but they did it, and the States did appoint delegates, who assembled at Philadelphia, and formed the Constitution. It was communicated to the old Congress, and that body recommended to the

States to make provision for calling the people together to act upon its adoption. Was not that exactly the case of passing a law to ascertain the will of the people in a new exigency? And this method was adopted without opposition, nobody suggesting that there could be any other mode of ascertaining the will of the people.

My learned friend went through the constitutions of several of the States. It is enough to say, that of the old thirteen States, the constitutions, with but one exception, contained no provision for their own amendment. In New Hampshire there was a provision for taking the sense of the people once in seven years. Yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the Legislature, as an ordinary exercise of legislative power. Now what State ever altered its constitution in any other mode? What alteration has ever been brought in, put in, forced in, or got in any how, by resolutions of mass meetings, and then by applying force? In what State has an assembly, calling itself the people, been held without law, without authority, without qualifications, without certain officers, with no oaths, securities, or sanctions of any kind, met and made a constitution, and called it the constitution of the STATE?

There must be some authentic mode of ascertaining the will of the people, else all is anarchy. It resolves itself into the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions, and all legislative rights, are prostrated and disregarded.

But my learned adversary says that if we maintain that the people (for he speaks in the name and on behalf of the people, to which I do not object) cannot commence changes in their government but by some previous act of legislation, and if the legislature will not grant such an act, we do in fact follow the example of the Holy Alliance, the doctors of Laybach, where the assembled sovereigns said that all changes of government must proceed from sovereigns; and it is said that we mark out the same rule for the people of Rhode Island.

Now, will any man, will my adversary here, on a moment's reflection, undertake to show the least resemblance on earth, between what I have called the American doctrine, and the doctrine of the sovereigns at Laybach? What do I contend for? I say that the will of the people must prevail, when it is ascertained; but there must be some legal and authentic mode of ascertaining that will; and then the people make what government they please. Was that the doctrine of Laybach, pray? Was not the doctrine there held this, that the *sovereign* should say what changes shall be made? Changes must proceed from them; new constitutions and new laws emanate from them; and all the people had to do was to submit. That is what they maintained. All changes began with the sovereigns and ended with the sovereigns. Pray, at about the time that the Congress of Laybach was in session, did the allied Powers put it to the people of Italy to say what sort of change they would have? And at a more recent date, did they ask the citizens of Cracow what change they would have in their constitution? Or did they take away their constitution, laws, and liberties, by their own sovereign act? No! All that is necessary here is, that the will of the people should be ascertained, by some

regular rule of proceeding, prescribed by previous law. But when ascertained, that will is as sovereign as the will of a despotic prince, the Czar of Muscovy, or the Emperor of Austria himself, though not quite so easily made known. A ukase or an edict signifies at once the will of a despotic prince; but that will of the people, which is here as sovereign as the will of such a prince, is not so quickly ascertained or known; and thence arises the necessity for suffrage, which is the mode whereby each man's power is made to tell upon the constitution of the government, and in the enactment of laws.

One of the most recent laws for taking the will of the people in any State is the law of 1845, of the State of New York. It begins by recommending to the people to assemble in their several election districts, and proceed to vote for delegates to a convention. If you will take the pains to read that act, it will be seen that New York regarded it as an ordinary exercise of legislative power. It applies all the penalties for fraudulent voting, as in other elections. It punishes false oaths, as in other cases. Certificates of the proper officers were to be held conclusive, and the will of the people was, in this respect, collected essentially in the same manner, supervised by the same officers, under the same guards against force and fraud, collusion and misrepresentation, as are usual in voting for State or United States officers.

We see, therefore, from the commencement of the Government under which we live, down to this late act of the State of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically.

In the next place, may it please your Honors, it becomes very important to consider what bearing the Constitution and laws of the United States have upon this Rhode Island question. Of course the Constitution of the United States recognises the existence of States. One branch of the legislature of the United States is composed of Senators, appointed by the States, in their State capacities. The Constitution of the United States (Art. iv., § 4,) says that "the United States shall guarantee to each State a republican form of government, and shall protect the several States against invasion; and on the application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence." Now, I cannot but think this a very stringent article, drawing after it the most important consequences, and all *good* consequences. The Constitution, in the section cited, speaks of States as having existing legislatures and existing executives; and it speaks of cases in which violence is practised or threatened against the State, in other words, "domestic violence;" and it says the State shall be protected. It says, then, does it not, that the existing government of a State shall be protected? My adversary says, if so, and if the legislature would not call a convention, and if, when the people rise to make a constitution, the United States step in and prohibit them, why the rights and privileges of the people are checked, controlled. Undoubtedly! The Constitution does not proceed on the *ground* of revolution; it does not proceed on any *right* of revolution; but it does go on the idea that with-

in, and under the Constitution, no new form of government can be established in any State, without the authority of the existing government. This cannot help the gentleman's argument much, because his own case falls within the same range. He has proved, he thinks, that there was an existing government, a paper government, at least, a rightful government, as he alleges. Suppose it to be rightful, in his sense of right. Suppose three-fourths of the people of Rhode Island to have been engaged in it, and ready to sustain it. What then? How is it to be done without the consent of the existing government? How is the *fact*, that three-fourths of the people are in favor of the new government, to be legally ascertained? And if the existing government deny that fact, and if that government holds on, and will not surrender till displaced by force, and if it is threatened by force, then the case of the Constitution arises, and the United States must aid the government that is in, because an attempt to displace a government by force is "domestic violence." It is the exigency provided for by the Constitution. If the existing government maintain its post, though three-fourths of the State have adopted the new constitution, is it not evident enough that the exigency arises in which the constitutional power here must go to the aid of the existing government? Look at the law of 28th February, 1795, in vol. 1 of the Statutes at Large, p. 424: "And in case of insurrection against any State, or *against the government thereof*, it shall be lawful for the President, on application of the legislature, to call out the militia of other States, as he may judge sufficient, to suppress such insurrection." Insurrection against the *existing* government is, then, the thing to be suppressed.

But the law and the Constitution, the whole system of American institutions, do not contemplate a case, in which a resort will be necessary to proceedings *aliunde*, or outside of the law and the Constitution, for the purpose of amending the frame of Government. It goes on the idea that the States are all republican, that they are all representative in their forms, and that these popular governments in each State, the annually created creatures of the people, will give all proper facilities and necessary aids to bring about changes, which the people may judge necessary in their constitutions. It takes that ground and acts on no other supposition. It assumes that the popular will will be accomplished in all particulars. And history has proved that the presumption is well founded.

This, may it please your Honors, is the view I take of what I have called the American System. These are the methods of bringing about changes in government.

Now, it is proper to look into this record, and see what the questions are that are presented by it, and consider:

1. Whether the case is one for judicial investigation at all; that is, whether this Court can try the matters which the plaintiff has offered to prove in the court below; and

2. In the second place, whether many things which he did offer to prove, if they could have been, and had been proved, were not acts of criminality, and therefore no justification; and

3. Whether all that was offered to be proved would show, that in point of fact, there had been established and put in operation any new *constitution*, displacing the old charter government of Rhode Island.

The declaration is in trespass. The writ was issued on the 8th of October, 1842, in which Martin Luther complains that Luther M. Borden and others broke into his house in Warren, Rhode Island, on the 29th of June, 1842, and disturbed his family, &c.

The defendant answers, that large numbers of men were in arms, in Rhode Island, for the purpose of overthrowing the government of the State, and made war upon it; that for the preservation of the government and people, martial law had been proclaimed by the governor, under an act of the Legislature, on the 25th of June, 1842. The plea goes on to aver, that the plaintiff was aiding and abetting this attempt to overthrow the government, and that the defendant was under the military authority of John T. Child, and was ordered by him to arrest the plaintiff; for which purpose he applied at the door of his house, and being refused entrance he forced the door.

The action is thus for an alleged trespass, and the plea is justification under the law of Rhode Island. The plea and replications are as usual in such cases in point of form. The plea was filed at the November term of 1842, and the case was tried at the November term of 1843, in the circuit court in Rhode Island. And in order to make out a defence, the defendant offered the charter of Rhode Island, the participation of the State in the Declaration of Independence, its uniting with the Confederation in 1778, its admission into the Union in 1790, its continuance in the Union, and its recognition as a State down to May, 1843, when the constitution now in force was adopted. And here let it be particularly remarked, that Congress admitted Rhode Island into the Constitution under this identical old Charter government, thereby giving sanction to it as a republican form of government. And the defendant then refers to all the laws and proceedings of the Assembly, till the adoption of the present constitution of Rhode Island. To repel the case of the defendant the plaintiff read the proceedings of the old legislature, and documents to show that the idea of changing the government had been entertained as long ago as 1790. He read also certain resolutions of the Assembly in 1841; memorials praying changes in the constitution, &c., &c. He next offered to prove that suffrage associations were formed throughout the State in 1840 and 1841; that steps were taken by them for holding public meetings, and to show the proceedings had at those meetings. In the next place, he offered to prove that a mass convention was held at Newport, attended by over four thousand persons, and another at Providence, at which over six thousand attended, at which resolutions were passed, which were offered. Then he offered to prove the election of delegates; the meeting of the convention in October, 1841, and the draughting of the Dorr constitution; the reassembling in 1841, the completion of the draught, its submission to the people, their voting upon it, its adoption, and the proclamation on the 13th of January, 1842, that the constitution so adopted was the law of the land.

That is the substance of what was averred as the formation of the Dorr constitution. The plaintiff next offered to prove that the constitution was adopted by a large majority of the qualified voters of the State; that officers were elected under it in April, 1842; that this new government assembled on the 3d of May, and he offered a copy of its proceedings.

And he sets forth that the court refused to admit testimony upon these subjects, and to these points; and ruled that the old government and laws of the State were in full force and power, and then existing when the alleged trespass was made; and that they justified the acts of the defendants, according to their plea.

I will give a few references to other proceedings of this new government. The new constitution was proclaimed on the 13th of January, 1842, by some of the officers of the convention. On the 13th of April, officers were appointed under it, and Mr. Dorr was chosen governor. On Tuesday, the 3d of May, the new legislature met, was organized, and then, it is insisted, the new constitution became the law of the land. The legislature sat through that whole day, morning and evening; adjourned: met the next day, and sat through all that day, morning and evening, and did a great deal of paper business. It went through the forms of choosing a supreme court, &c., and on the evening of the 4th of May, it adjourned, to meet again on the first Monday of July, in Providence,

"And word spake never more."

It never re-assembled. This government, then, whatever it was, came into existence on the *third* day of May, and went out of existence on the *fourth* day of May.

I will now give some references concerning the new constitution authorized by the government, authorized by the old government, and which is now the constitution of Rhode Island. It was framed in November, 1842. It was voted upon by the people on the 21st, 22nd, and 23rd days of November, was then by them accepted, and became by its own provisions the constitution of Rhode Island on the first Tuesday of May, 1843.

Now, what in the mean time had become of Mr. Dorr's government? According to their own principle, they say they are forced to admit that it was superseded by the new, that is to say, the present government, because the people had accepted the new government. But they had no new government till May, 1843. According to them, then, there was an *interregnum* of a whole year. If Mr. Dorr had had a government, what became of it? If it ever came in, what put it out of existence? Why did it not meet on the day to which it had adjourned? It was not displaced by the new constitution, because that had not been agreed upon in convention till November. It was not adopted by the people till the last of November, and it did not go into operation till May. What had become of Mr. Dorr's government?

I think it is important to note that the new constitution, established according to the prescribed forms, came thus into operation in May, 1843, and was admitted by all to be the constitution of the State. What then happened in the State of Rhode Island? I do not mean to go through all the trials that were had after this ideal government of Mr. Dorr had ceased to exist; but I will ask attention to the report of the trial of Dorr for treason, which took place in 1844, before all the judges of the supreme court of the State. He was indicted in August, 1842, and the trial came on in March, 1844. The indictment was found while the charter government was in force, and the trial was had under the new constitution.

He was found guilty of treason. And I turn to the report of the trial now, to call attention to the language of the court in its charge, as delivered by Chief Justice Durfee. I present the following extract from that charge:—

"It may be, gentlemen, that he really believed himself to be the Governor of the State, and that he acted throughout under this delusion. However this may go to extenuate the offence, it does not take from it its legal guilt. It is no defence to an indictment for the violation of any law for the defendant to come into court and say, 'I thought that I was but exercising a constitutional right, and I claim an acquittal on the ground of mistake.' Were it so, there would be an end to all law and all government. Courts and juries would have nothing to do but to sit in judgment upon indictments, in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit it; and, according to this doctrine, you must acquit. The main ground upon which the prisoner sought for a justification was, that a constitution had been adopted by a majority of the male adult population of this State, voting in their primary or natural capacity or condition, and that he was subsequently elected, and did the acts charged, as Governor under it. He offered the votes themselves to prove its adoption, which were also to be followed by proof of his election. This evidence we have ruled out. Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted or a governor elected, or not. Courts take notice without proof offered from the bar, what the constitution is or was, and who is or was the governor of their own State. It belongs to the legislature to exercise this high duty. It is the legislature which, in the exercise of its delegated sovereignty, counts the votes and declares whether a constitution be adopted or a governor elected, or not; and we cannot revise and reverse their acts in this particular, without usurping their power. Were the votes on the adoption of our present constitution now offered here to prove that it was or was not adopted; or those given for the governor under it, to prove that he was or was not elected; we could not receive the evidence ourselves; we could not permit it to pass to the jury. And why not? Because, if we did so, we should cease to be a mere judicial, and become a political tribunal, with the whole sovereignty in our hands. Neither the people nor the legislature would be sovereign. We should be sovereign, or you would be sovereign; and we should deal out to parties litigant, here at our bar, sovereignty to this or that, according to rules or laws of our own making, and heretofore unknown in courts.

"In what condition would this country be, if appeals could be thus taken to courts and juries? *This* jury might decide one way, and *that* another, and the sovereignty might be found here to-day, and there to-morrow. Sovereignty is above courts or juries, and the creature cannot sit in judgment upon its creator. Were this instrument offered as the constitution of a foreign State, we might, perhaps, under some circumstances, require proof of its existence; but, even in that case, the fact would not be ascertained by counting the votes given at its adoption, but by the certificate of the Secretary of State, under the broad seal of the

State. This instrument is not offered as a foreign constitution, and [illegible] g
court is bound to know what the constitution of the government is u[illegible]his
which it acts, without any proof even of that high character. We k[illegible]y,
nothing of the existence of the so-called ' people's constitution' as [illegible]ng
and there is no proof before you of its adoption, and of the electi[illegible]s
the prisoner as Governor under it; and you can return a verdict only [illegible]Tw
the evidence that has passed to you."

Having thus, may it please your Honors, attempted to state the q[illegible]
tions as they arise, and having referred to what has taken place in R[illegible]ng
Island, I shall present what further I have to say in three propositio[illegible]

1st. I say, first, that the matters offered to be proved by the plain[illegible], it
in the court below, are not of judicial cognizance; and proof of th[illegible]
therefore, was properly rejected by the court.

2d. If all these matters could be, and had been, legally proved, th[illegible]
would have constituted no defence, because they show nothing but [illegible]
illegal attempt to overthrow the government of Rhode Island.

3d. No proof was offered by the plaintiff to show that, in fact, an[illegible]
ther government had gone into operation, by which the charter gover[illegible]
ment had become displaced.

And first, these matters are not of judicial cognizance. Does this [illegible]
need arguing? Are the various matters of fact alleged, the meet[illegible]
ings, the appointment of committees, the qualifications of voters,—[illegible]
there any one of all these matters of which a court of law can take
cognizance in a case, in which it is to decide on sovereignty? Are
fundamental changes in the frame of a government to be thus proved?
The thing to be proved is a change of the sovereign power. Two legis-
latures existed at the same time, both claiming power to pass laws.
Both could not have a legal existence. What, then, is the attempt of our
adversaries? To put down one sovereign government, and to put ano-
ther up, by facts and proceedings in regard to elections out of doors,
unauthorized by any law whatever. Regular proceedings for a change
of government may in some cases, perhaps, be taken notice of by a
court; but this court must look elsewhere than out of doors, and to pub-
lic meetings, irregular and unauthorized, for the decision of such a
question as this. It naturally looks to that authority under which it
sits here, to the provisions of the Constitution which have created this
tribunal, and to the laws by which its proceedings are regulated. It
must look to the acts of the government of the United States, in its va-
rious branches.

This Rhode Island disturbance, as every body knows, was brought
to the knowledge of the President of the United States by the public au-
thorities of Rhode Island; and how did he treat it? The United States
have guarantied to each State a republican form of government. And
a law of Congress has directed the President, in a constitutional case re-
quiring the adoption of such a proceeding, to call out the militia to put
down domestic violence, and suppress insurrection. Well, then, appli-
cation was made to the President of the United States, to the Executive
power of the United States. For, according to our system, it devolves
upon the Executive to determine, in the first instance, what are and
what are not governments. The President recognises governments, for-

eign governments, as they appear from time to time in the occurrences of this changeful world. And the Constitution and the laws make it his duty, if an insurrection exists against the government of any State, rendering it necessary to appear with an armed force, to call out the militia and suppress it.

Two things may here be properly considered. The first is, that the Constitution declares that the United States shall protect every State against domestic violence; and the law of 1795, making provision for carrying this constitutional duty into effect in all proper cases, declares that "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States to call out the militia of other States to suppress such insurrection." These constitutional and legal provisions make it the indispensable duty of the President to decide, in cases of commotion, what is the rightful government of the State. He cannot avoid such decision. And in this case, he decided, of course, that the existing government, the charter government, was the rightful government. He could not possibly have decided otherwise.

In the next place, if events had made it necessary to call out the militia, and the officers and soldiers of such militia, in protecting the existing government, had done precisely what the defendants in this case did, could an action have been maintained against them? No one would assert so absurd a proposition.

In reply to the requisition of the Governor, the President stated that he did not think it was yet time for the application of force; but he wrote a letter to the Secretary of War, in which he directed him to confer with the Governor of Rhode Island; and, whenever it should appear to them to be necessary, to call out from Massachusetts and Connecticut a militia force sufficient to *terminate at once* this insurrection by the authority of the Government of the United States. We are at no loss, therefore, to know how the Executive Government of the United States treated this insurrection. It was regarded as fit *to be suppressed*. That is manifest from the President's letters to the Secretary of War and to Gov. King.

Now, the eye of this Court must be directed to the proceedings of the General Government, which had its attention called to the subject, and which did institute proceedings respecting it. And the Court will learn from the proceedings of the Executive branch of the Government, and of the two Chambers above us, how the disturbances in Rhode Island were regarded; whether they were looked upon as the establishment of any government, or as a mere, pure, unauthorized, unqualified *insurrection* against the authority of the existing government of the State.

I say, therefore, that, upon that ground, these facts are not facts which this Court can inquire into, or which the court below could try; because they are facts going to prove, (if they prove any thing,) the establishment of a new sovereignty; and that is a question to be settled elsewhere and otherwise. From the very nature of the case, it is not a question to be decided by judicial inquiry. Take, for example, one of the points which it involves: My adversary offered to prove that the constitution was adopted by a majority of the people of Rhode Island; by a large majority, as he alleges. What does this offer call

on your Honors to do? Why, to ascertain, by proof, what is the number of citizens of Rhode Island; and how many attended the meetings, at which delegates to the Convention were elected; and then you have to add them all up, and prove by testimony the qualifications of every one of them to be an elector. It is enough to state such a proposition to show its absurdity. As none such ever was sustained in a court of law, so none such can be or ought to be sustained. Observe that *minutes* of proceedings can be no proof, for they were made by no authentic persons; registers were kept by no warranted officers; chairmen and moderators were chosen without authority. In short, there are no *official* records; there is no testimony in the case but parole. Chief Justice Durfee has stated this so plainly, that I need not dwell upon it.

But, again, I say you cannot look into the facts attempted to be proved, because of the certainty of the continuance of the old government till the new and legal constitution went into effect on the 3d of May, 1843. To prove that there was another constitution of two days' length, would be ridiculous. And I say that the decision of Rhode Island herself, by her Legislature, by her Executive, by the adjudication of her highest court of law, on the trial of Dorr, has shut up the whole case. Do you propose—I will not put it in that form—but would it be proper for this Court, to reverse that adjudication? That declares that the Judges of Rhode Island know nothing of the "People's Constitution." Is it possible, then, for this Court, or for the court below, to know any thing of it?

It appears to me that, if there were nothing else in the case, the proceedings of Rhode Island herself must close every body's mouth, in the court and out of it. Rhode Island is competent to decide the question herself, and every body else ought to be bound by her decision. And she has decided it.

And it is but a branch of this to say, according to my second proposition:

2. That if every thing offered had been proved, if in the nature of the case these facts and proceedings could have been received as proof, the court could not have listened to them, because every one of them is regarded by the State in which they took place, as a *criminal* act. Who can derive any authority from acts declared to be criminal? The very proceedings which are now set up here, show that this pretended constitution was founded upon acts which the Legislature of the State had provided punishment for, and which the courts of the State have punished. All, therefore, which the plaintiff has attempted to prove, are acts which he was not allowed to prove, because they were criminal in themselves, and have been so treated and punished, so far as the State Government, in its discretion, has thought proper to punish them.

3. Thirdly, and lastly, I say that there is no evidence offered, nor has any distinct allegation been made, that there was an actual government established and put in operation to displace the charter government, even for a single day. That is evident enough. You find the whole embraced in those two days, the third and fourth of May. The French revolution was thought to be somewhat rapid. That took *three* days. But this work was accomplished in two. It is all there, and what is it? Its birth, its whole life, and its death, were accomplished in forty-

eight hours. What does it appear the members of this government did? Why, they vote A, Treasurer, and C, Secretary, and Mr. Dorr, Governor; and choose officers of the Supreme Court. But did ever any man under that authority attempt to exercise a particle of official power? Did any man ever bring a suit? Did ever an officer make an arrest? Did any act proceed from any member of this government, or from any agent of it, to touch a citizen of Rhode Island in his person, his safety, or his property, so as to make the party answerable upon an indictment or in a civil suit? Never. It never performed one single act of government. It never did a thing in the world! All was patriotism, and all was paper; and with patriotism and with paper it went out on the 4th of May, admitting itself to be, as all must regard it, a contemptible *sham!*

I have now done with the principles involved in this case, and the questions presented on this record.

In regard to the other case, I have but few words to say. And, first, I think it is to be regretted that the court below sent up such a list of points on which it was divided. I shall not go through them, and shall leave it to the Court to say whether, after they shall have disposed of the first cause, there is any thing left. I shall only draw attention to the subject of martial law; and in respect to that, instead of going back to martial law as it existed in England at the time the charter of Rhode Island was granted, I shall merely observe that martial law confers power of arrest, of summary trial, &c.; and that when it has been proclaimed, the land becomes a camp, and the law of the camp is the law of the land. Judge Story defines martial law to be the law of war—a resort to military authority, in cases where the civil law is not sufficient; and it confers summary power, not to be used arbitrarily or for the gratification of personal feelings of hatred or revenge, but for the preservation of order and of the public peace. The officer clothed with it is to judge of the degree of force that the necessity of the case may demand; and there is no limit to this, except such as is to be found in the nature and character of the exigency.

I now take leave of this whole case. That it is an interesting incident in the history of our institutions, I freely admit. That it has come hither, is a subject of no regret to me. I might have said that I see nothing to complain of in the proceedings of what is called the Charter Government of Rhode Island, except that it might perhaps, have discreetly taken measures at an earlier period for revising the constitution. If in that delay it erred, it was the error into which prudent and cautious men would fall. As to the enormity of freehold suffrage, how long is it since Virginia, the parent of States, gave up her freehold suffrage? How long is it since nobody voted for governor in New York without a freehold qualification? There are now States in which no man can vote for members of the upper branch of the legislature who does not own fifty acres of land. Every State requires more or less of a property qualification in its officers and electors; and it is for discreet legislation, or constitutional provisions, to determine what its amount shall be. Even the Dorr constitution had a property qualification. According to its provisions, for officers of the State, to be sure, anybody could vote; but its authors remembered that taxation and representation go together, and

therefore they declared that no man, in any town, should vote to lay a tax for town purposes, who had not the means to pay his portion. It said to him, you cannot vote in the town of Providence to levy a tax for repairing the streets of Providence; but you may vote for governor, and for thirteen representatives, from the town of Providence, and send them to the legislature, and there they may tax the people of Rhode Island at their sovereign will and pleasure.

I believe that no harm can come of the Rhode Island agitation in 1841, but rather good. It will purify the political atmosphere from some of its noxious mists, and I hope it will clear men's minds from unfounded notions and delusions. I hope it will bring them to look at the regularity, the order with which we carry on what, if the word were not so much abused, I would call our *glorious* representative system of popular government. Its principles will stand the test of this crisis, as they have stood the test and torture of others. They are exposed always, and they always will be exposed to dangers. There are dangers from the extremes of too much and of too little popular liberty; from monarchy, or military despotism, on one side, and from licentiousness and anarchy on the other. This always will be the case. The classical navigator had been told that he must pass a narrow and dangerous strait:

> "Dextrum Scylla latus, lævum implacata Charybdis,
> "Obsidet"——

Forewarned, he was alive to his danger, and knew, by signs not doubtful, where he was, when he approached its scene:

> "Et gemitum ingentem pelagi, pulsataque saxa,
> "Audimus longe, fractasque ad litora voces;
> "Exsultanque vada, atque æstu miscentur arenæ.
> "..... Nimirum hæc illa Charybdis!"

The long seeing sagacity of our fathers enables us to know, equally well, where we are, when we hear the voices of tumultuary assemblies, and see the turbulence created by numbers, meeting and acting without the restraints of law; and has most wisely provided constitutional means of escape and security. When the established authority of Government is openly contemned; when no deference is paid to the regular and authentic declarations of the public will; when assembled masses put themselves above the law, and calling themselves the people, attempt by force to seize on the Government; when the social and political order of the State is thus threatened with overthrow, and the spray of the waves of violent popular commotion lashes the stars, our political pilots may well cry out:

> "Nimirum hæc illa Charybdis!"

The prudence of the country, the sober wisdom of the people, has thus far enabled us to carry this Constitution, and all our constitutions, through the perils which have surrounded them, without running upon the rocks on one side, or being swallowed up in the eddying whirlpools of the other. And I fervently hope that this signal happiness and good fortune will continue, and that our children after us will exercise a similar prudence, and wisdom, and justice; and that, under the Divine blessing, our system of Free Government may continue to go on, with equal prosperity, to the end of time.